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No. 89-478

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner

v.

SANDRA ANN CRAIG,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE INSTITUTE FOR PSYCHOLOGICAL THERAPIES IN SUPPORT OF SANDRA ANN CRAIG, RESPONDENT

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STATE OF MARYLAND,
Petitioner,

V.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Ralph Underwager, Ph.D. and Holida Wakefield, M.A., a partnership during business as The Institute for Psychological Therapies (IPT) hereby move for leave to file the attached brief *amicus curiae*. The attorneys for the petitioner and the respondent have consented.

This brief is a response to the *amicus curiae* brief submitted by the American Psychological Association (APA). As such it is in support of respondent, Sandra Ann Craig.

Dr. Underwager is a member of the American Psychological Association. He and Ms. Wakefield are licensed psychologists under Minnesota statute.

Based upon their clinical practice, including diagnosis, evaluation and treatment of victims and perpetrators of child sexual abuse for over 25 years, their research in child sexual abuse in eight separate areas, their roles as consultants in over 1000 cases of child abuse accusations, as qualified expert witnesses in criminal and civil trials occurring in over forty states and five countries, they repectfully disagree with many of the claims and argument of the APA brief submitted to this court.[1]

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1. Dr. Underwager testified in the Jordan, Minnesota child abuse cases, the Cleveland-Middlesbrough Parliamentary Inquiry in England, and provided testimony to the Supreme Court of Holland.

Dr. Underwager and Ms. Wakefield are the authors of two learned treatises in the area of child sexual abuse and are publishers of a journal dealing with child abuse.[2]:

The powerful desire for social change produces shifts in attitudes and law not based upon empirical data but rather in response to a deeply felt need. The danger is that unintended consequences may emerge. IPT believes that this has happened in response to child sexual abuse. An unintended consequence is the likelihood of an unacceptable level of false positives, that is, persons wrongly identified as abusers and victims. The seriousness of accusations

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2. Wakefield and Underwager, Accusations of Child Sexual Abuse (1987); Wakefield and Underwager, The Real World of Child Interogations, (1989); *Issues in Child Abuse Accusations*, Northfield, MN..

of sexual abuse is that if such an error is made the lives of both adults and children are damaged and may be forever ruined.

A consideration completely ignored in the APA brief and also overlooked by prosecutors, law enforcement, child protection officers and judges is the effect on a child if adults make a false positive mistake. When adults treat a child who has not been abused as if the child had been abused, it is not an innocuous or benign experience for the child. It is devastating and may result in serious harm. It is an assault upon a young child's ability to develop the capacity to tell what is real from what is not real. To miss an instance where a child has been abused and commit a false negative error is also harmful to a child. Although there has been some discussion of this type of error there has

been no research on the issue. In either direction, adult errors may have tragic consequences for a child.

For the foregoing reasons, IPT respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

Repectfully submitted,

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BRIEF OF AMICUS CURIAE

INSTITUTE FOR PSYCHOLOGICAL THERAPIES

IN SUPPORT OF SANDRA ANN CRAIG, RESPONDENT

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INTEREST OF AMICUS CURIAE

The interest of the Institute for Psychological Therapies is described in the accompanying Motion for Leave to File Brief *Amicus Curiae*. It can be summed up as the interest to support all reasonable and sound efforts to improve the accuracy of the way society responds to accusations of child sexual abuse for the protection of children and the protection of persons accused.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only reason for psychology to be given any attention by the law is the expectation that the science of psychology may improve the accuracy of the legal system. The first duty of psychologists who address the courts is to be accurate and scientifically credible. Psychology is a broad and diverse discipline.

Within psychology there are differences in the level of scientific status or credibility. The validity of specific concepts, theories, techniques, and research domains may vary from *high* and *clear* to *low* and *doubtful*.[1]

We strongly question the accuracy of the statement in the APA brief that "The resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with their alleged abuser" (APA pp.3-4). This opinion is not *high* and *clear* in the scientific support for its validity but is instead *low* and *doubtful*. Every claim advanced by the APA brief as a basis for encouraging this court to change the

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1. Meehl (1989). Law and Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist. *Behavioral Sciences & the Law*, 7(1), 521 - 550.

position of Kentucky v. Stincer 482 U.S.730 (1987) is of *low* and *doubtful* validity.

Further, the APA brief combines together research, clinical observation, clinical experience, and theory as if all had equal weight and can be considered as one piece (APA pp.3,10,15). The only support offered by the APA brief for its Point II is clinical observation and theory.

The final point in the argument of the APA brief is that research demonstrates children may refuse to testify, or testify less completely, and jurors may not be able to weigh children's testimony accurately. This may then result in a disservice to the truth-seeking rationale of the Confrontation Clause.

The truth-seeking rationale is described by Justice Scalia in a recent opinion:

> "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back. ' In the former context, even if a lie is told it will often be told less convincingly....The right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss - the right to cross-examine the accuser; both 'ensur[e] the integrity of the fact-finding process.' [citations omitted]. The State can hardly gainsay the profound effect upon a witness accuses. .... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser, or reveal the child coached a malevolent adult. It is a truism that constitutional protections have costs.*Coy v. Iowa*, 101 LEd 2d 857, 866 (1988).

The APA brief assumes that a child fears an accused person and therefore the capacity to testify is adversely affected. The assumption that the fear is

caused by having been abused by the defendant already assumes guilt and violates the presumption of innocence, ignoring the possibility that a child witness, in the interim between an accusation and testimony, may have been taught by adults to fear the accused. Fear may be learned from adults repeatedly telling a child that the accused has hurt them, is bad, wicked, should be punished, and is to be feared. To diminish the constitutional right to confrontation on the basis of the APA brief's assumptions would be to put individual rights at the mercy of either well-intentioned folly or deliberate vindictive manipulation. This point will be further developed in Point IV.

POINT I. The APA brief does not offer evidence with high and clear validity that serious emotional trauma may be inflicted upon children through courtroom confrontation with their alleged abusers. The APA brief overstates the data and fails to offer this court the limits and qualifications that must be placed upon the data cited.

The first citation of an authority to support the APA brief's claim, "A recent review of studies of child victims of sexual abuse showed that a significant proportion of victims suffer moderate to severe emotional distress after the episode is disclosed," is the Brown and Finkelhor (1986) article.[2]

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2. Browne & Finkelhor, Impact of Child Sexual Abuse: A Review of the Research, 99 Psychological Bull. 66 (1986)

This review was available in 1987. Further, by using the term victims, the APA brief already assumes the reality of the abuse. Disclosure is synonymous with proof certain. The APA brief claims the review established a factual proposition, but does not inform the court what the review actually claims about the validity of the data reported.

> "However, because many of the studies lacked standardized outcome measure and adequate comparison groups, it is not clear that these findings reflect the experience of all child victims of sexual abuse or are even representative of those children currently being seen in clinical settings. At this point the empirical literature on the initial effects of child sexual abuse would have to be considered sketchy ....Conclusions from the foregoing review must be tempered by the fact that they are based on a body of research that is still in its infancy. Most of the available studies have sample, design, and measurement problems that could invalidate their findings."[3]

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3. Id, pp.69,75

The brief cites forty-nine articles and presentations in the Table of Authorities, Of these, seven are post 1987 and could be seen as relating to the issue of effects of courtroom confrontation. Of the seven, six are unpublished papers or reports. Only one is published."[4]

The only other authority cited by the brief to claim "much stronger" evidence is now available are two unpublished reports by Goodman. Unpublished reports and unpublished data have minimal scientific credibility or standing. There has been no opportunity for the broader scientific community to evaluate the methodology and quality of the research. Thus, the assertion of "much stronger" evidence rests upon the

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4. Flin,Davis & Tarrant, The Child Witness (1988)

narrow base of one published article and two unpublished articles. It is a gross exaggeration for the APA brief to represent to this court that there is "much stronger" evidence after 1987."

Note #5 (APA Brief) includes, as a secondary citation, Conte and Berliner.[5] Once again the APA brief does not give this court the limits and qualifications.

> "... the factor analysis was somewhat disappointing .... We decided to create a series of clinical dimensions from items on the Behavioral Profile due to the relatively poor results of the factor analysis"[6]

What this means in plain language is that the authors did the statistical analysis to prevent individual bias and

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5. Conte & Berliner (1988). The Impact of Sexual Abuse on Children: Empirical Findings. In L. Walker, *Handbook on Sexual Abuse of Children.*

6. Id p 78.

subjective speculation and did not like what they got so they chose to ignore it and proceed with purely arbitrary *ad hoc* personal choices about behaviors, alleged to be shown by abused children.

> "Several methodological problems deserve special consideration....Measures of psychopathology do not appear to successfully describe the behavior or functioning of many abused children.... While the clinical dimensions and a summary total score do reliably describe the difference, there is some question in our mind how useful these board descriptors are either in directing clinical practice or in research efforts.[7]

Having abandoned any pretense of scientific procedure, this article cannot be viewed as scientific and should only be a source of possible hypotheses to be checked by a truly empirical approach.

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7. Id. p 86

To support the claims that face to face confrontation with the defendant is the chief source of trauma to children the APA brief refers to Goodman's Final Report to the National Institute of Justice; Runyan, et al.; Flin, et al.; and Berliner and Barbieri.[8] The Flin et al report does not support this claim. Indeed, forty-six children were interviewed prior to trial. Five children gave responses indicating fear of the accused. This is not most children in this study. Twenty-two children were observed testifying. Two demonstrated signs of distress. Runyan, et al.,[9]

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8. APA Brief Amicus Curiae, (1989), passim, pp. 7-13.

9. Runyan, Everson, Edelsohn, Hunter, & Coulter, Impact of Legal Intervention on Sexually Abused Children, 113 J. Pediatrics 647 (1988)

concludes that testifying in juvenile court is beneficial and suggests delay is the cause of potential harmful effects.[10] The use of Goodman's Final Report to support the claim that most children are fearful of confronting the accused is an overinterpretation of the reported data. Tables 14, 15, and 16 report similar frequencies for fear of testifying in court and negative reactions to seeing defendant in court. This data does not permit separating out which causes which. None of the frequencies in these tables warrant the claim that most children are fearful of seeing the defendant.

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10. The data in Runyan does not warrant a distinction in the impact between juvenile and criminal court but rather points to prolongation of the time period.

Kassin et al show that it is possible to get consensus among psychologists on what psychological topics meet the general acceptance provision of the Frye test.[11] The APA brief in this case offers no scientific information that meets the requirement of an adequate level of acceptance in the psychological community.

The APA brief does not support its claim of "much stronger" evidence with any credible and valid evidence. The APA brief does not offer data to support the claim that fear of courtroom confrontation is the characteristic of most children. The APA brief offers only speculative opinion, oversimplification,

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11. Kassin, Ellsworth & Smith (1989) The "General Acceptance" of Psychological Research on Eyewitness Testimony. *American Psychologist, 44*(8), pp.1089-1098.

overinterpretation, and inflated representations of preliminary studies. Therefore we urge the court to disregard this argument of the APA brief. There is no credible scientific support for it.

POINT II. Speculative theories and clinical experience cannot support assertions purporting to be factual but which have no basis in any empirical data. The APA brief frequently commits this error.

Until there is empirical data to establish an acceptable level of scientific support, clinical observations are hunches and not facts. When the APA brief proposes a "model" based on clinical experience an publications[12] without

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12. p.15, APA Brief. Finkelhor & Browne (1985). The Traumatic Impact of Child Sexual Abuse, *American Journal of Orthopsychiatry*, 55(4), pp. 530-541 does not claim to be based on any research. It is

warning this court that there is no factual basis for the proposed "model," once again *low* and *doubtful* material is being suggested to this court as a basis for a major change in a significant constitutional issue.

The APA Brief describes four speculative factors and then in each paragraph adds a conclusion for which there is not evidence either in the model or any cited research. The four unsupported conclusions are:

> "The fear, when present, may be rearoused in the presence of the defendant.... The strong emotion of betrayal may be rekindled when the vulnerable child confronts a formerly trusted defendant... When con-

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clearly offered as a speculative "conceptualizations. . . that can be used in both research and treatment" (p. 530) but not for the consideration of the U.S. Supreme Court. When the APA brief describes this model as based "to a lesser degree on systematic research," the lesser degree is none.

> fronted by the defendant, the child may reexperience the sense of helplessness or powerlessness. . . confrontation may arouse these complex and powerful emotions and interfere with the child victim-witness' ability to communicate reasonably" (APA pp. 15-16).

Also, authorities cited in Note 37, p. 16, do not support these statements. Burgess and Holmstrom is not a research study but field notes on adult victims of rape. They report 9 of 61 women gave "Afraid of man taking revenge" as a reason for not pressing charges.[13] Rogers concludes his article with this statement:

> Well intentioned yet misguided concerns for the safety and well-being of child victims of sexual assault have led many to conclude ... to great a risk of psychological trauma for the child victim. The alternative view, presented her and elsewhere, is that these risks have been over-stated."[14]

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13. Burgess & Holmstrom (1973). Rape: The Victim and the Criminal Justice System. *Victimology: A New Focus, 3*,Lexington Books, pp. 21-30.

No credible scientific support is offered by the APA brief for the argument that it is possible, on the basis of speculative theory and unreliable clinical observation, to make reliable and valid individualized determinations about the need for protective measures for children. Therefore we urge the court to understand the speculative nature of these pronouncements and not rely on them as a factor in a reasoned decision.

Point III. The APA Brief does not offer credible scientific evidence to support the assertion that emotional arousal may result in unreliable testimony.

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14. Rogers, Child Sexual Abuse and the Courts: Preliminary Findings *Social Work and Child Sexual Abuse*,p.144,151(1982).

The first authority cited by the APA brief to support a claim that a child victim-witness is "most likely to refuse to testify, to be unable to verbalize answers to questions, or to be tearful" (APA pp.18,19) is an anecdote from a court record. Anecdotal accounts are not scientific evidence and cannot be used to support a claim of scientific credibility.

In Point III the APA brief cites a study by Goodman et al.[15] However, in that study, reporting what is touted as ecologically valid research, that is more closely approaching a real world interrogation, using stressful medical procedures such as venipuncture and inocula-

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15. Goodman, Rudy, Bottoms & Amam, Children's Memory and Concerns: Ecological Issues in the Study of Children's Testimony in What Young Children Remember and Why (R. Fivush & Hudson)

tion, the literature review section includes "...there is reason to believe that high levels of stress are associated with better memory" (p. 34) and cites four studies. After describing the prediction prior to collecting data that stress would facilitate memory, this is the summary statement of the research results.

> "Our general finding was that stress had a facilitative effect on the children's reports. Specifically, planned comparisons revealed that children at the highest stress levels recalled more information than the other children and were less suggestible. Interestingly, the children had to reach a level of great distress before beneficial effects on memory were evidenced."[16]

It is difficult to understand how a research study by one of the principal authors of the brief, Goodman, whose work is the most frequently cited in the

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16. Id p. 34.

brief, could be overlooked or not understood. Yet, it denies both the premise and the conclusion of the argument in APA Brief Point III. Whatever the cause, the APA Brief presents a pattern of selective citation and selective reporting that requires caution and wariness in accepting any of the claims made therein.

Another problem occurring in several places in the APA Brief is shown in the citation of Hill and Hill.[17]

"One study indicated children...are more likely to omit information...than children who testify in a private room without the defendant present, as in a one-way closed circuit television arrangement." (APA p.21)

This study is the only one cited for the following conclusion that children's testimony is adversely affected by courtroom

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17. Hill & Hill, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809 (1987)

confrontation. However, Hill and Hill report that their results on this do not show statistical significance:

"While not significant in a one-way analysis of variance, there was a tendency for subjects in the small room to relate more central items in free recall than subjects in the courtroom ($p<.087$). (In social science research it is generally assumed that the means of two or more conditions are different if the probability of such an occurrence by chance is less than or equal to five percent.)"[18]

For the APA Brief not to inform the court that a study which is the sole basis for the climactic argument has no statistical significance, not even to use the term marginal significance, but to present it as a fact requires the court to exercise cautious reserve in evaluating the weight to be given to the brief.

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18. Id. p. 815, footnote #21

Point IV. In the interim between accusation and a trial, therapy for a child thought to be a victim is feeling-expressive, insight oriented therapy which may well have the effect of teaching a child to be afraid of a defendant.

Especially in criminal trials there is often a long time between an accusation and a child testifying. During this interim, many children are placed in therapy for having been sexually abused, a decision made before the factual issue is determined in the courtroom. Analysis of records of therapy given to 405 children[19] and review of 617 articles and books discussing treatment[20] shows that

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19. Wakefield & Underwager, Accusations of Child Sexual Abuse (1988)

20. IPT Resource File, category, treatment, contains 617 references dealing with treatment accorded to children when there is an accusation of sexual abuse.

the therapy given to children focuses on getting their feelings about being abused out and acting out those feelings in a variety of techniques. However, this often includes encouraging and reinforcing the expressing of anger and hatred toward the alleged perpetrator. If a child has spent time in therapy talking about how bad the defendant is, hitting a bobo doll identified as the defendant, drawing pictures of the defendant and burning them, making clay figures of the defendant and putting them in jail, or throwing darts at a picture of the defendant,[21] it is not surprising if that child may talk about fearing the accused and even show fear if seeing him or her in the courtroom. But the fear may well be caused by the treatment rather than by the alleged abuse.

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21. Such therapeutic behaviors are documented in the IPT files of actual cases.

If it can be demonstrated that a given child has been subjected to this therapeutic technique, confrontation in court may help to determine the cause of the fear, if it is present. While there is no scientific data to support this specific proposition, it may occur as it did in the trial of Robert and Lois Bentz, when their five-year-old son, Billy, who had been in foster care and therapy for months, was led into the courtroom by the prosecutor. He spied his parents, waved, smiled, and in a cheery voice called out, "Hi Mom, Hi Dad!"[22]

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22. Robert and Lois Bentz were the first persons tried in the Jordan, Minnesota sexual abuse accusations. The jury acquitted them on all counts in September, 1984, after a six week trial.

Conclusion

For the foregoing reasons, amicus respectfully urges the court to continue to accept the APA Brief in Kentucky v Stincer as the most accurate rendering of credible scientific evidence. The current APA Brief in Maryland v. Craig is flawed by an undeclared bias that causes a high frequency of overinterpreted statements, partial descriptions of research, simplification and leveling of complex outcomes, and selective reporting.

Above all other considerations, however, is the observed fact that the current APA brief offers only material that is of *low* and *doubtful* validity and lacks the required scientific status and level of acceptability for the court to consider it in reaching its decision. When considering the issue of a state in-

terest compelling limitations of an individual constitutional right, only the best information, solidly established in contact with the real world, should be able to move the state further to limit individual personal liberty and rights.

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